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September 1, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-178
Howard B. Dolgoff
(File No. BPH-911223ME)

Dear Mr. Caton:

Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, an applicant in the above-referenced comparative hearing proceeding (MM Docket No. 93-178), are an original and six (6) copies of his Reply To Opposition To Petition To Enlarge Issues in the proceeding. Kindly refer this submission to Administrative Law Judge John M. Frysiak.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By:

Irving Gastfreund

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-178
HOWARD B. DOLGOFF and)	File No. BPH-911223ME
MARK AND RENEE CARTER)	File No. BPH-911224MD
For a Construction Permit For a)	
New FM Radio Station on Channel)	
292A in Miramar Beach, Florida)	

TO: Administrative Law Judge John M. Frysia**REPLY TO OPPOSITION TO PETITION TO ENLARGE ISSUES**

Irving Gastfreund

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Counsel to Howard B. Dolgoff

September 1, 1993

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Summary

The Carters' Opposition to Dolgoff's Petition To Enlarge Issues is both procedurally defective and substantively insufficient to rebut Dolgoff's showings. Substantial and material questions of fact warranting evidentiary inquiry still exist with respect to whether the Carters engaged in misrepresentation or lack of candor to the Commission with respect to the availability of their proposed transmitter site and with respect to their financial qualifications. Furthermore, Dolgoff's showing in support of his request for designation of an abuse of process issue against the Carters stands unopposed. Accordingly, site misrepresentation/lack of candor issues, financial misrepresentation/lack of candor issues and an abuse of process and relating character qualifications issue should be designated against the Carters in this proceeding.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20584

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 93-178
)	
HOWARD B. DOLGOFF and)	File No. BPH-911223ME
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MARK AND RENEE CARTER)	File No. BPH-911224MD
)	
For a Construction Permit For a)	
New FM Radio Station on Channel)	
292A in Miramar Beach, Florida)	

TO: Administrative Law Judge John M. Frysiak

REPLY TO OPPOSITION TO PETITION TO ENLARGE ISSUES

HOWARD B. DOLGOFF ("DolgoFF"), by his attorneys, pursuant to Sections 1.229(d) and 1.294(c) of the Commission's Rules, hereby respectfully replies to the Opposition To Petition To Enlarge Issues filed herein on August 25, 1993, on behalf of Mark and Renee Carter (the "Carters"). In support whereof, it is shown as follows:

I. Introduction

On August 10, 1993, DolgoFF filed a Petition To Enlarge Issues in this proceeding against the Carters.¹ DolgoFF therein sought enlargement of the issues in this proceeding to include designation against the Carters of site misrepresentation/lack of candor issues, financial misrepresentation/lack of candor issues, and an abuse of process issue and related character qualifications issue. DolgoFF demonstrated in his Petition that a substantial and material question of fact exists as to whether the Carters had a proper factual basis upon which to certify, in their application herein, that they had "reasonable assurance" of the availability of their proposed transmitter site. Furthermore, DolgoFF demonstrated in his Petition that a substantial and material question of fact exists as to whether the

¹ That Petition was modified by an Erratum filed with the Commission on August 11, 1993.

Carters had a proper factual basis for certifying, in their application, that they were financially qualified at the time of such certification (i.e., on December 21, 1991). In addition, Dolgoff demonstrated that the Carters have engaged in abuses of the Commission's processes by repeatedly filing frivolous and vexatious pleadings and charges in this proceeding against Dolgoff, without any basis in law or in fact for many of the Carters' claims.

On August 25, 1993, the Carters filed their Opposition with respect to Dolgoff's Petition To Enlarge Issues. The entirety of the Opposition, which occupies no more than five pages, consists of little more than a general demurrer with respect to the showings made by Dolgoff in his Petition To Enlarge Issues. The Carters contend, without any factual showing to support their allegations, that they had "reasonable assurance" of site availability as of the date that they signed their application and certified that they had reasonable assurance of site availability.² The Carters further contend, with a logic that defies analysis, that the mere fact that the Carters entered into an option agreement with the site owners (Gregory C. Meyer and his wife, Gloria J. Meyer) in May, 1992, supports the "natural inference" that there was a "meeting of the minds" between the Carters and Mr. and Mrs. Meyer as to site availability as of December 21, 1991, when the Carters signed their application and certified as to site availability. Opposition at 4. Significantly, the Carters fail to supply a single affidavit or declaration from the site owners (Mr. and Mrs. Meyer), attesting, under penalty of perjury, that there was indeed a "meeting of the minds" with the Carters on or prior to December 21, 1991, with respect to the terms and conditions under which the property would be made available to the Carters for use as a transmitter site.

Similarly, the Carters' Opposition contains mere general denials with respect to the showings made by Dolgoff in his Petition To Enlarge Issues in support of his request for designation of

² A photocopy of Section VII of the Carters' application (FCC Form 301, pages 24 and 25) is annexed hereto as Exhibit 1. Those pages contain the Carters' certification of site availability and the Carters' signature on their application. As will be noted from Exhibit 1, the Carters signed their application on December 21, 1991.

financial misrepresentation/lack of candor issues. The Carters contend, in this regard, that the July 23, 1993 letter to the Carters from Mark B. Holdbrooks, Assistant Vice President of AmSouth Bank of Florida,³ which sets forth the terms and conditions upon which the bank is willing to make a loan to the Carters, contains language to the effect that AmSouth Bank of Florida was, on December 12, 1991, willing to make available to the Carters a loan of up to \$250,000 for the purpose of constructing and operating their proposed station and that the bank would have been willing, on December 12, 1991, to make a loan to the Carters on the specific terms and conditions set forth in the July 23, 1993 bank letter. The Carters claim that the recitations in the July 23, 1993, bank letter demonstrate that the Carters had reasonable assurance of financing when they certified, in their application, on December 21, 1991, that "sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." FCC Form 301, page 5, Section III, ¶1.⁴

However, the July 23, 1993 bank letter does not state that the particular terms and conditions set forth therein were specifically set forth and identified for the Carters in December 1991 and that the Carters and AmSouth Bank of Florida both agreed to those terms on or prior to December 21, 1991, as the Carters suggest in their Opposition. Id. at 2-3. Significantly, the Carters' Opposition fails to contained any affidavit or declaration under penalty of perjury from Mr. Mark B. Holdbrooks attesting that the specific terms and conditions contained in Mr. Holdbrooks' July 23, 1993 letter (see Exhibit 2, infra) were specifically set forth and identified for the Carters in December 1991, and that the Carters and the bank had both agreed to those terms on or prior to December 21, 1991 (i.e., the date that the Carters signed their application).

³ A copy of the July 23, 1993 bank letter was attached as part of Exhibit 2 to Dolgoff's Petition to Enlarge Issues. For convenience, a copy of that letter is annexed hereto as Exhibit 2.

⁴ A photocopy of Section III of the Carters' application is annexed hereto as Exhibit 3.

Finally, the Carters' Opposition contains not a single word in opposition to the showing made in Dolgoff's Petition To Enlarge Issues in support of Dolgoff's request for designation against the Carters of an abuse of process issue.

For the reasons set forth below, the Carters' Opposition to Dolgoff's Petition To Enlarge Issues is both procedurally defective and substantively insufficient to rebut Dolgoff's showings. As will be shown below, substantial and material questions of fact warranting evidentiary inquiry still exist with respect to the issues posed by Dolgoff in his Petition To Enlarge Issues. Accordingly, site misrepresentation/lack of candor issues, financial misrepresentation/lack of candor issues, and an abuse of process and related character qualifications issue should be designated against the Carters in this proceeding.

II. Argument

A. The Carters' Opposition Is Procedurally Defective

Under Section 1.229(d) of the Commission's Rules, any opposition to a petition to enlarge issues in a hearing proceeding must

"... contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof. [Emphasis added.]"

Analogous requirements are established under Section 309(d)(1) of the Communications Act.

As shown above, the Carters' Opposition fails to meet these stringent procedural requirements. It is significant, in this regard, that not a single affidavit or declaration under penalty of perjury is supplied by the Carters in support of any of the factual allegations contained in their Opposition to Dolgoff's Petition To Enlarge Issues. Indeed, much of the Carters' Opposition consists of little more than speculation as to what "could" have happened, or what "could" have been agreed to, or what "could" have been known at or prior to the time the Carters signed their application on December 21, 1991. See, e.g., Opposition at 3-5. In light of these clear failures by the Carters to meet the strict procedural requirements of Section 1.229(d) of the Commission's Rules and Section 309(d)(1) of the

Communications Act, the Carters' Opposition should be completely discounted and disregarded in assessing whether substantial and material questions of fact exist concerning site misrepresentation and financial misrepresentation or lack of candor by the Carters or concerning the abuse of process by the Carters.

In any event, as shown below, notwithstanding the claims made by the Carters in their Opposition, such substantial and material question of fact remain, thereby warranting designation against the Carters of the hearing issues sought by Dolgoff in his Petition To Enlarge Issues herein.

**B. Substantial And Material Questions
Of Fact Exist Which Warrant Evidentiary Inquiry**

(i). Site Misrepresentation/Lack Of Candor Issues

Notwithstanding the Carters' unsupported allegations to the contrary, the facts are clear that, as of December 21, 1991, when the Carters signed their application, the Carters did not have reasonable assurance of the availability of their proposed transmitter site. Accordingly, the Carters' certification in their application that they had reasonable assurance of site availability constituted misrepresentation by the Carters to the Commission.

Annexed hereto as Exhibit 4 is the Declaration of Howard B. Dolgoff. Mr. Dolgoff therein states that, in February, 1992, he undertook the task of locating and securing an alternative transmitter site to improve his application's proposed coverage prior to the amendment-as-of-right deadline applicable to his application. In connection with those efforts, Mr. Dolgoff states that he telephoned Mr. Gregory C. Meyer, who, together with his wife, Gloria J. Meyer, own land that appeared to be potentially suitable as a transmitter site. Indeed, as noted by Mr. Dolgoff in his Declaration, a portion of Mr. Meyer's land east of Mack Bayou Road is specified as the proposed transmitter site of the Carters in their application.

Mr. Dolgoff states in his annexed Declaration that, during his initial telephone conversation with Mr. Meyer in February 1992, Mr. Dolgoff explained to Mr. Meyer that it was Mr. Dolgoff's desire to purchase or lease a portion of his property in Miramar Beach, Florida, for the construction

of a radio station transmitting antenna tower. Mr. Meyer stated (and his wife later confirmed) that Mr. and Mrs. Meyer would be willing to sell or lease approximately four acres of the lower southeast corner of their Miramar Beach property to Mr. Dolgoff for use as a transmitter site. This appears to be the very same acreage that is the subject of the option agreement substantially entered into by the Carters with Mr. and Mrs. Meyer in early May 1992.⁵ Significantly, as noted in Mr. Dolgoff's Declaration, Mr. Meyer specifically advised Mr. Dolgoff in their February 1992, telephone conversation that, as of that date, he had not entered into any agreement or arrangement with, or commitment to, anyone else contemplating the sale or lease of his Miramar Beach property. Mr. Meyer acknowledged to Mr. Dolgoff in their February 1992 conversation that, in December, 1991, Mr. Meyer has been contacted by Mark Carter, who had inquired as to whether Mr. Meyer's Miramar Beach, Florida, property was available for purchase. According to Mr. Meyer, he told Mr. Carter, in December, 1991, that he was prepared to entertain discussions about the possibility of selling the property if Mr. Carter had a serious offer to make. However, according to Mr. Meyer, during the December 1991 conversation, Mr. Carter and Mr. Meyer never discussed particular terms of a purchase and sale, or even any purchase price. See Exhibit 4, infra, at 2. Mr. Meyer further stated that, when he and Mr. Carter ended their conversation in December 1991, it was Mr. Meyer's expectation that Mr. Carter would contact him against with a specific offer. Id. at 2-3. However, according to Mr. Meyer, neither Mr. Carter nor anyone acting on his behalf or his wife's behalf ever contacted Mr. or Mrs. Meyer for this purpose following Mr. Meyer's initial telephone conversation with Mr. Carter in December 1991. During his February 1992 conversation, Mr. Meyer emphasized

⁵ A copy of the option agreement is annexed as Attachment 1 to Mr. Dolgoff's Declaration. It should be noted that, although the top portion of the first page of the option agreement bears the date of May 1, 1992 (apparently signifying that the Carters signed the document on that date), the lower portion of the second page of the option agreement indicates that the site owners (Mr. and Mrs. Meyer) did not sign the agreement until May 18, 1992. Thus, it appears that the option agreement was not actually entered into until May 18, 1992.

to Mr. Dolgoff that Mr. Meyer had never made any commitment to Mr. Carter regarding the land in question. Id. at 3.

Mr. Dolgoff further states, in his annexed Declaration, that, in April 1992, Mr. David Kramer, the real estate broker representing Mr. and Mrs. Meyer in Florida with respect to their Miramar Beach property, advised Mr. Dolgoff that he (Mr. Kramer) had contacted Mark Carter in April 1992 on instructions from Mr. Meyer to see whether Mr. Carter had an offer to make with respect to the purchase of Mr. and Mrs. Meyer's property. Mr. Kramer subsequently advised Mr. Dolgoff that Mr. Carter made an offer in the latter part of April 1992 to acquire an option to purchase a portion of Mr. and Mrs. Meyer's property in Miramar Beach, that negotiations concerning the terms of the option thereupon ensued, and that an option agreement between Mr. and Mrs. Carter and Mr. and Mrs. Meyer was entered into in early May 1992. See Exhibit 4, infra, at 3.

The foregoing facts make clear that there never was any "meeting of the minds" as between the Carters and Mr. and Mrs. Meyer concerning the availability of the Meyers' property for use as a transmitter site until 1992. Certainly, such a "meeting of the minds" did not exist as of December 21, 1991, when the Carters signed their application and certified that they had reasonable assurance of site availability.

It is well-established that an applicant cannot merely have vague discussions with a site owner, negotiate no bona fide arrangement, and earnestly represent that it has "reasonable assurance" of the availability of that site. Dutchess Communications Corp., 101 FCC 2d 243, 253 (Rev. Bd. 1985). Although no formal, written, legally binding agreement is necessary, the Commission has long held that some firm understanding is essential. Id., at 253. See, also William F. Wallace, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974) ("mere possibility that the site will be available will not suffice"); El Camino Broadcasting Corp., 12 FCC 2d 25, 26 (Rev. Bd. 1968) (mere fact that the property owner has indicated that he will discuss the possibility of a lease at some future date does not necessarily provide any more assurance than an unrejected offer). At a minimum, "a meeting of the minds resulting in some firm understanding as to the site's availability is essential. [Emphasis added.]"

Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988); Adelai E. Stevenson IV, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); Barry Skidelsky, 7 FCC Rcd 1, 7-8 (Rev. Bd. 1992). Any such "meeting of the minds" must constitute, at a minimum, a meeting of the minds as to the key terms upon which the land will be made available as a transmitter site. Alden Communications Corp., 102 FCC 2d 518, 519 (Rev. Bd. 1985). A mere favorable attitude on the part of the site owner, standing alone, is insufficient to legally demonstrate "reasonable assurance" of site availability. See William F. Wallace, *supra*, 49 FCC 2d at 1427.

In connection with the foregoing, it is noteworthy that, in appending the site certification to the FCC Form 301 application form, the Commission sought to ensure that applicants do, in fact, obtain "reasonable assurance" from the site owner or its agent that the applicant's proposed transmitter site will be available, thereby deterring "speculative applications." Amendment Of Sections 73.3572 and 73.3573 Relating To Processing Of FM and TV Broadcast Applications, ___ FCC Rcd ___, 58 RR 2d 776, 782 (1985). Based on the facts presented above and in Dolgoff's Petition To Enlarge Issues, it can only be concluded that the Carters' application is "speculative", precisely the kind that the Commission sought to avoid.

The above-cited Commission standards for establishing "reasonable assurance" of site availability were not met by the Carters as of the date they signed their application and certified as to site availability on December 21, 1991. As shown above, on or before December 21, 1991, the only action that had been taken by the Carters in connection with securing site availability was that Mark Carter had contacted the owner of his proposed site (Mr. Meyer) to inquire as to whether the property was available for purchase, and Mr. Meyer indicated that he was prepared to entertain discussions about the possibility of selling the property if Mr. Carter had a serious offer to make. However, as of December 21, 1991, Mr. Carter and Mr. Meyer never discussed any particular terms of a purchase and sale or any particular purchase price. Indeed, as noted in Mr. Dolgoff's annexed Declaration, as of December 1991, it was Mr. Meyer's expectation that Mr. Carter would contact Mr. Meyer again with a specific offer; however, no such offer was forthcoming at any time prior to February 1992.

Furthermore, as shown in Mr. Dolgoff's Declaration, it was only in the latter part of April 1992, when Mr. Meyer's real estate agent's initial contact with Mr. Carter to see whether Mr. Carter had an offer to make with respect to the purchase of the property, that negotiations ensued, culminating in an option agreement between the Carters and Mr. and Mrs. Meyer in May 1992. See Exhibit 4, infra.

These facts are fully corroborated by the terms of the option agreement ultimately entered into by the Carters and Mr. and Mrs. Meyer. Given the complexity of the terms contained in the option agreement, one would expect that there would have been some memorialization of those terms in some letter, memorandum, or some other written document if, indeed, a "meeting of the minds resulting in some firm understanding" as to the key terms upon which the land was to be made available had been reached as between the Carters and Mr. and Mrs. Meyer in December 1991. See Genessee Communications, Inc., 3 FCC Rcd 3595 (Rev. Bd. 1988); Alden Communications Corp., 102 FCC 2d 518, 519 (Rev. Bd. 1985). Yet, as shown in Dolgoff's Petition To Enlarge Issues, it appears that no such documents were in existence prior to May 1, 1992, since none were produced by the Carters for Dolgoff in response to the standard document production order and Section 1.325(a)(1)(vi) of the Commission's Rules.⁶

In light of all the foregoing, it is clear that on or prior to December 21, 1991, when the Carters signed their application and certified that they had "reasonable assurance" of site availability, the Carters did not have a "meeting of the minds" with the site owners "resulting in some firm understanding" as the key terms upon which their proposed transmitter site would be made available to them. Indeed, no such "meeting of the minds" or "firm understanding" existed until May 1992 -- i.e., almost five months after the date that the Carters' certified and represented to the Commission that they had reasonable assurance of site available. The foregoing facts make it clear that the Carters

⁶ Where a landowner or its agent imposes a specific condition or set of conditions on its approval of site availability, those conditions must be met before reasonable assurance can be said to exist. See Lee Optical And Associated Companies Retirement And Pension Fund Trust, 2 FCC Rcd 5480, 5483-85 (Rev. Bd. 1987); Southern Florida Broadcasting, Inc., 99 FCC 2d 840, 846 (Rev. Bd. 1984).

engaged in misrepresentations to the Commission when they certified, on December 21, 1991, that they had "reasonable assurance" of site availability; at the very least they were lacking in candor. Accordingly, appropriate site misrepresentation/lack of candor issues should be designated against the Carters in this proceeding.⁷

(ii). Financial Misrepresentation/Lack Of Candor Issues

In response to ¶1 of Section III of their application, the Carters affirmatively certified and represented to the Commission that "... sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. [Emphasis added.]" There is absolutely no merit to the Carters' contention that the July 23, 1993 letter to them from Mr. Mark B. Holdbrooks, Assistant Vice President of AmSouth Bank of Florida (Exhibit 2, infra) establishes that the Carters had a sufficient factual basis for making the aforementioned certification and representation in their application on December 21, 1991.

It should be noted that the July 23, 1993 "loan commitment" letter (see Exhibit 2, infra) was dated (and presumably written) only one business day prior to the date (i.e., Monday, July 26, 1993) upon which the Carters were required to produce and make available for Dolgoff their response to the standard document production order and to Section 1.325(a)(1)(v) of the documents in Rules, which requires that copies of all bank letters be produced for opposing applicants. Conveniently, this "twelfth-hour" bank letter (apparently created in the "nick of time" to meet the Carters' document production obligations under the standard document production order and Section 1.325(a)(1)(v) of the Commission's Rules) not only sets forth particular terms and conditions under which AmSouth Bank of Florida would be willing to make a loan to the Carters, but also contains language to the effect that the bank was, on December 12, 1991, willing to make available to the Carters a loan of up

⁷ Since the operative facts with respect to the Carters' site certification are unquestionably "peculiarly within the knowledge of" the Carters, both the burden of proceeding with the introduction of evidence and the burden of proof on the requested site misrepresentation/lack of candor issues should be placed on the Carters. See Barry Skidelsky, 7 FCC Rcd 1, 11 n. 11 (Rev. Bd. 1992).

to \$250,000 for the purpose of constructing and operating their proposed station. The July 23, 1993 letter appears to be a mere accommodation to the Carters by stating, with "20-20 hindsight", that the bank would have been willing in December 1991 to make a loan to the Carters on the specific terms and conditions set forth in the July 23, 1993 letter.

However, the July 23, 1993 bank letter does not state that the particular terms and conditions set forth therein were specifically set forth and identified for the Carters on or prior to the date (i.e., December 21, 1991) that the Carters signed their application and certified as to their financial qualifications, nor does the July 23, 1993 bank letter state that the Carters and AmSouth Bank of Florida both agreed to those terms and conditions on or before December 21, 1991.

It is clear that the specific terms and conditions set forth in the July 23, 1993 bank letter were not set forth in writing for the Carters prior to the date that they signed their application on December 21, 1991, since any such written document would have been required to be produced for Dolgoff under the standard document production order and under Section 1.325(a)(1)(v) of the Commission's Rules, and since no such pre-application document containing the specific terms and conditions set forth in the July 23, 1993 bank letter was produced by the Carters. Indeed, the only bank letter dated on or before December 21, 1991, which was produced by the Carters in response to the standard document production order was a copy of a December 12, 1991 letter to Mark Carter from Joe R. Miller, then Vice President of AmSouth Bank of Florida. In that letter (a copy of which is annexed hereto as Exhibit 5), Mr. Miller merely acknowledges his having met with the Carters on December 12, 1991 "to discuss possible financing needs [emphasis added]" for their proposed station, and he merely expresses the bank's interest " ... in discussing" further with Mr. Carter his banking needs "once a license has been obtained."

The December 12, 1991 bank letter, apparently obtained by the Carters prior to the signing of their application, contains no information which would support the Carters' certification in Section III of their application, that, as of December 21, 1991, "... sufficient funds [were] available from committed sources to construct and operate the requested facilities for three months without revenues.

[Emphasis added.]" FCC Form 301, Section III, ¶1. More specifically, the December 12, 1991 letter to Mr. Carter from Mr. Miller does not identify the specific terms and conditions upon which a loan would be made available (e.g., amount of the loan, interest rate, collateral requirements, repayment terms, etc.).

The December 12, 1991 letter, coupled with the "20-20 hindsight" accommodation language in the July 23, 1993 bank letter, and coupled with the fact that the July 23, 1993 bank letter was dated only one business day before the Carters' document exchange in this proceeding, raise a substantial and material question of fact as to whether, as of the date (i.e., December 21, 1991) that they certified as to their financial qualifications in their application, the Carters had a committed source of funds to construct their proposed station and to finance operations of the station for three months without revenues. Clearly, the Carters could not have properly certified as to this fact on December 21, 1991, if, as of that date, they had been given no specific and detailed information as to terms and conditions of the proposed loan from AmSouth Bank of Florida, which were not set forth in writing for them until over a year and a half later on July 23, 1993.

It should be noted that, in their Opposition to Dolgoff's Petition To Enlarge Issues, the Carters concede that the specific terms and conditions set forth in the bank letter of July 23, 1993 were not, prior to that date, set forth in writing by AmSouth Bank of Florida. See Opposition at 3. The Carters appear to contend that no such writing was necessary in order for their certification as to reasonable assurance of a committed source of funds not to constitute misrepresentation. Id.

A preliminary problem with this line of argument by the Carters is that, as noted above, the December 12, 1991 bank letter makes it clear that, during the Carters' December 12, 1991 meeting with the bank, the bank did no more than express interest in discussing further the financing needs for the Carters' proposed station "once a license has been obtained." Such exploratory discussions hardly suffice as a proper predicate for a certification of financial qualifications. Moreover, the clear indication from the face of the December 12, 1991 bank letter that no specific terms and conditions of fund availability were set forth for the Carters and accepted by them on or prior to December 12,

1991 is corroborated by the bank letter of July 23, 1993, which does not state that the particular terms and conditions set forth in the July 23, 1993 letter had been specifically set forth and identified for the Carters in December 1991 and that the Carters and the bank had agreed to those terms on or before December 21, 1991. Thus, the December 12, 1991 bank letter and the July 23, 1993 bank letter taken together, letter fully support the conclusion that there was no firm "meeting of the minds" prior to December 21, 1991 by the Carters and AmSouth Bank of Florida as to the terms and conditions under which a loan would be made available.

Importantly, the Carters have not supplied any affidavit or declaration under penalty of perjury by Mr. Mark B. Holdbrooks, Assistant Vice President of AmSouth Bank of Florida, in which Mr. Holdbrooks would affirm and attest that the specific terms and conditions set forth in his July 23, 1993 letter to the Carters had been specifically set forth and identified for the Carters on or before December 21, 1991 and that the Carters and the bank had both agreed to those terms on or prior to December 21, 1991. Since the operative facts with respect to what was in fact discussed and set forth by the bank for the Carters on or prior to December 21, 1991, were unquestionably peculiarly within the knowledge of the Carters and Mr. Holdbrooks,⁸ the Carters' failure to supply an affidavit or declaration under penalty of perjury from Mr. Holdbrooks concerning these matters raises an inference (if not a presumption) that Mr. Holdbrooks would not have been willing to state, under penalty of perjury, that, on or prior to December 21, 1991, the particular terms and conditions set forth in his July 23, 1993 letter to the Carters had been specifically set forth and identified for the Carters and that the Carters and the bank had both agreed to those terms on or prior to December 21, 1991.

It is manifest that the Commission did not change its substantive financial qualifications requirements when it adopted the financial certification procedure for broadcast applications. See

⁸ Mr. Holdbrooks and Mr. Joe R. Miller both meet with the Carters on December 12, 1991. See Dolgoff's Petition To Enlarge Issues at Exhibit 2.

Revision of Form 301, __ FCC 2d __, 50 RR 2d 381, 382 ¶6 (1981). See also Certification of Financial Qualifications By Applicants For Broadcast Station Construction Permits, 2 FCC Rcd 2122 (1987); South Florida Broadcasting Co, 94 FCC 2d 452, 455 (1983). Thus, a broadcast applicant filing in accordance with Revision Of Form 301, supra, still must have reasonable assurance of having sufficient funds from a committed source to construct the proposed station and operate it without revenue for three months before the applicant certifies in an application that it is financially qualified. Northampton Media Associates, 4 FCC Rcd 5517, 5518 (1989). "In other words the applicant may not certify its financial qualifications and then arrange financing." Id. at 5518 (citing Pepper Schultz, 103 FCC 2d 1052, 1058-59 (Rev. Bd. 1986), review denied, 2 FCC Rcd 1476 (1987), recon. granted in part, 3 FCC Rcd 1200 (1988).)

In Northampton Media Associates, 4 FCC Rcd 5517 (1989), recon. denied, 5 FCC Rcd 3075, aff'd sub nom., Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991), the Commission held that, in order to prove that, at the time of certification of financial qualifications, the applicant had reasonable assurance of the availability of funds to meet its estimated construction and first quarter-year operational expenses, the applicant must adduce "probative evidence", in the form of "substantial and reliable evidence", showing committed sources of funds to construct and operate the proposed station for three months without revenue. 4 FCC Rcd at 5519. The Commission specifically held as follows in Northampton Media Associates:

"Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds. For example, uncontroverted affidavits or testimony establishing an oral contract to lend money would suffice to demonstrate a committed source of funds. [Emphasis added.]

Northampton Media Associates, supra, 4 FCC Rcd at 5519.

In addition, the Commission has held that:

"[W]here ... [a] loan agreement is oral, such as in this case, the existence of such an agreement at the time of financial certification must be established by both the applicant and lender via uncontroverted affidavits and/or testimony at hearing." [Emphasis added.]

Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (1990).

Here, the essence of the Carters' claim is that they did, in fact, have what amounted to an oral contract to lend money with AmSouth Bank of Florida prior to December 21, 1991, when they signed their application and certified that they were financially qualified. However, the Carters have failed to supply any uncontroverted affidavits or testimony from both the Carters themselves and the officers of AmSouth Bank of Florida in December 1991 (i.e., Mr. Mark B. Holdbrooks and Mr. Joe R. Miller) establishing that, on or prior to December 21, 1991, there was, in fact, in existence an oral contract to lend the Carters the funds upon which they claim reliance, subject to the specific terms and conditions which were set forth for the first time in writing in Mr. Holdbrooks' July 23, 1993 letter to the Carters. For these reasons alone, financial misrepresentation and associated lack of candor issues must be designated against the Carters, since the Carters have failed to demonstrate that, at the time of their financial certification, they were indeed financially qualified and that there was a "meeting of the minds" by AmSouth Bank of Florida and the Carters as to the specific terms and conditions upon which a loan would be made available.

It should be noted, in this connection, that the Review Board has required that, in order to demonstrate that an applicant has "reasonable assurance" of committed sources of funds from a lending institution, the applicant must show:

"... that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (e.g., payment period, interest rate, collateral requirements, and other basic terms). [Emphasis added.]"

Scioto Broadcasters, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990).

The Review Board further stated in Scioto Broadcasters as follows:

"In other words, central to any successful 'reasonable assurance' showing of a loan from a financial institution is that the 'individual qualifications' of the borrower have been preliminarily reviewed ... [citation omitted] ..., that adequate collateral has been demonstrated ... [citation omitted] ..., and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no 'reasonable assurance'. [Emphasis added.]"

Id. at 5160.

Here, as shown above, there is a substantial and material question of fact as to whether the particular terms and conditions set forth in the July 23, 1993 bank letter were, in fact, specifically identified by the bank for the Carters on or prior to the date they signed their application and as to whether, on or prior to that date, had reached a "meeting of the minds" and agreement with the bank as to those specific terms and conditions.

In this connection, Mr. Holdbrooks' July 23, 1993 letter to the Carters states that the terms of the proposed loan were based, inter alia, "... on review of your FM application". See Exhibit 2, infra. In his Petition To Enlarge Issues, Dolgoff noted that a substantial and material question of fact exists as to how the bank could have made its purported loan commitment to the Carters on December 12, 1991 -- i.e., almost two weeks prior to the filing of their application -- on terms which purportedly were based, in part, on the bank's review of the Carters' application, which was not filed until almost two weeks later. In response, the Carters allege as follows:

"Obviously, the later filing date does not mean that the Carters could not and did not show the bank the application they intended to file."

Opposition at 3.

This statement is hardly a substitute for a clear and unequivocal assertion in an affidavit or in a declaration under penalty of perjury, to the effect that the application was, in fact, complete as of December 12, 1991 and was, in fact, shown to the officers of AmSouth Bank of Florida on or before their December 12, 1991 meeting with the Carters. It should be noted, in this regard, that the engineering portion of the Carters' application was not signed by their Technical Consultant until December 18, 1991. See Carters' Application, Section V-B, FCC Form 301, p. 18. Thus, it is hardly surprising that the Carters would be most reluctant to provide any affidavit stating under oath that a complete copy of their application was, in fact, shown to one or more officers of AmSouth Bank of Florida on or prior to December 12, 1991.

It should also be noted that the July 23, 1993 bank letter from Mr. Holdbrooks to the Carters states that security for the proposed loan would be a "first lien on equipment and 2nd Mortgage on

real estate located at Mack Bayou Road". See Exhibit 2, infra, at 2. In his Petition To Enlarge Issues, Dolgoff showed that a substantial and material question of fact exists as to how the bank could have known, on December 12, 1991 that the Carters would come to own their proposed transmitter site on Mack Bayou Road so as to place them in a position to provide a second mortgage on that real estate to AmSouth Bank of Florida as security for the purported loan. In their Opposition, the Carters respond by stating as follows:

"As for the point about the second mortgage, the bank certainly could know, and apparently did know, of the Carters intention to acquire the site, and could, and did, make the taking of a second mortgage thereon one of the terms of the loan commitment."

Opposition at 3.

The problem with the foregoing response is that it is not date-specific: it does not state the critical facts of what precisely the bank knew and when the bank came to know it. Even if it were to be assumed, arguendo, that the bank did, indeed, know of the Carters intention to acquire their proposed transmitter site, by way of ownership rather than lease, it was not until May 1992 -- i.e., almost five months following the filing of the Carters' application -- that the Carters entered into an option agreement with the owners of the land on Mack Bayou Road specified by the Carters as their proposed transmitter site.

It was not until that option agreement was executed by the site owners (Mr. and Mrs. Meyer) on May 18, 1992, that the Carters were in a position to know that the site owners were willing to finance the purchase of the property for the Carters, with the promissory note for the indebtedness to be secured by a mortgage on the property. Thus, it would have been impossible for the bank or the Carters to have known, as of December 12, 1991, that, almost five months later, in May 1992, the Carters would have been able to persuade the site owners to provide seller financing and a first mortgage on the property. Manifestly, the fact that the July 23, 1993 bank letter states that security for the proposed loan would include a second mortgage on the Carters' transmitter site presupposes that the bank knew that someone else (i.e., the site owners) would be holding a first mortgage on the

property. Neither the Carters nor AmSouth Bank of Florida could have known this latter fact until May 1992, since the financing arrangement between the Carters and Mr. and Mrs. Meyer was not agreed to until that time. Hence, it is inherently incredible that the bank would have told the Carters, on December 12, 1991, that security for the proposed loan would include a second mortgage on the real estate located at Mack Bayou Road, specified as the Carters' transmitter site.

Furthermore, as shown above and in the annexed Declaration of Howard B. Dolgoff (see Exhibit 4, infra), according to the owner of the Carters' proposed transmitter site, until April, 1992, Mr. Carter had only had one contact with Mr. Meyer (the site owner) to inquire as to whether Mr. Meyer's property was available for purchase. According to Mr. Meyer, he told Mr. Carter in December 1991 that he was prepared to entertain discussions about the possibility of selling the property if Mr. Carter had a serious offer to make. However, according to Mr. Meyer, during the December 1991 conversation, Mr. Carter and Mr. Meyer never discussed particular terms of a purchase and sale or any particular purchase price. Moreover, as shown in Mr. Dolgoff's annexed Declaration, no specific offer was forthcoming from Mr. Carter to Mr. Meyer until Mr. and Mrs. Meyer's real estate broker, Mr. David Kramer, contacted Mr. Carter in the latter part of April 1992, on instructions from Mr. Meyer, to see whether Mr. Carter had an offer to make with respect to the purchase of the property. Mr. Kramer subsequently advised that it was not until the latter part of April 1992 that Mr. Carter made an offer to acquire an option to purchase a portion of Mr. and Mrs. Meyer's property, that negotiations concerning the specific terms of the option thereupon ensued, and that an option agreement between the Carters and Mr. and Mrs. Meyer was ultimately entered into in May 1992. See Exhibit 4, infra.

These facts make it plain that the Carters did not know, and could not have known, until May 1992: (a) the specific terms and conditions under which Mr. and Mrs. Meyer would make their property available to the Carters, and (b) the fact that Mr. and Mrs. Meyer were willing to finance the Carters' purchase of the property in exchange for a first mortgage on the property to secure a promissory note on the indebtedness. In light of the foregoing, a substantial and material question of

fact exists as to whether the assertions contained in the Carters' August 25, 1993 Opposition To Petition To Enlarge Issues constitute misrepresentations or lack of candor. In all events, substantial and material questions of fact warranting evidentiary inquiry exist as to whether the Carters did, indeed, have sufficient factual basis for certifying in their application on December 21, 1991, that they were financially qualified, and, accordingly, financial misrepresentations lack of candor issues should be designated against the Carters.⁹

(iii). Abuse of Process Issue

As shown by Dolgoff in his Petition To Enlarge Issues, in his August 10, 1993, Opposition To Contingent Motion To Enlarge Issues, and in Dolgoff's August 10, 1993 Opposition To Countermotion For Summary Decision, the Carters have repeatedly filed frivolous and vexatious pleadings and charges in this proceeding against Dolgoff, without any basis in law or in fact for many of the Carters' claims. The latter two pleadings are hereby incorporated herein by reference.

The Review Board has held:

"Misrepresentation and lack of candor charges are very grave matters. They ought not to be bandied about. The duty to come forward with a prima facie showing of deception is patently strong where a misrepresentation issue is sought. Alabama Citizens For Responsive Public Television, Inc., 73 FCC 2d 615, 46 RR 2d 408 (1979). The petitioner must also make a demonstration of a desire, motive, or logical reason to mislead in order to have an issue added. The Commission will not infer actual or attempted deceptions or improper motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation or surmise but lacking factual support. Garrett, Andrews & Letizia, supra, 86 FCC 2d at 1180, 49 RR 2d at 1007."

Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

Notwithstanding this admonition, in their July 26, 1993 Contingent Motion To Enlarge Issues, the Carters make multiple charges that Dolgoff has engaged in misrepresentation and lacks the

⁹ Since the facts and circumstances surrounding the Carters' financial certification are uniquely and particularly within the knowledge of the Carters, both the burden of proceeding with the introduction of evidence and the burden of proof on the requested financial misrepresentation/lack of candor issues should be placed on the Carters. See Barry Skidelsky, 7 FCC Rcd 1, 11 n. 11 (Rev. Bd. 1992). See also Modesto Broadcast Group, 5 FCC Rcd 4674m 4675 n. 3 (Rev. Bd. 1990).

requisite character qualifications to be a Commission licensee. As established by Dolgoff in his August 10, 1993, Opposition To Contingent Motion To Enlarge Issues and his August 10, 1993 Opposition To Countermotion For Partial Summary Decision, the Carters have cavalierly thrown about falsehoods and reckless charges against Dolgoff and have filed pleadings which they either know or should have known were totally lacking in any factual or legal basis.

This type of vexatious pleading strategy is not what the Commission's pleading rules were intended to achieve. It should be noted, in this regard, that Section 1.52 of the Commission's Rules provides, in pertinent part, as follows:

"The signature or electronic reproduction thereof by an attorney constitutes a certificate by him that he has read the document; that to the best of his knowledge, information and belief that there is good ground to support it; and that it is not interposed for delay. [Emphasis added.]"

Consequently, the Carters' pleading tactics must be viewed as abuses of the Commission's processes, and, accordingly, an abuse of process and associated character qualifications issue should be designated against the Carters. See Abuses Of The Commission's Processes, 2 FCC Rcd 5563 (1987).

The fact that Dolgoff's showing in support of his request for designation of an abuse of process issue remains unopposed by the Carters is sufficient, per se, to raise an inference, if not a presumption, that Dolgoff's showing cannot be rebutted by the Carters. Moreover, in a pleading filed with the Commission after the filing of Dolgoff's Petition To Enlarge Issues, the Carters persist in making false and reckless charges against Dolgoff -- charges which they either know or should know are totally lacking in any factual or legal basis.

More specifically, on August 25, 1993, the Carters filed their Consolidated Reply To Oppositions in response to the oppositions of Dolgoff and of the Mass Media Bureau with respect to the Carters' July 26, 1993 Contingent Motion To Enlarge Issues. A copy of the Carters' Consolidated Reply is annexed hereto as Exhibit 6. In their Consolidated Reply, and in response to Dolgoff's showing in his August 10, 1993 Opposition To Contingent Motion To Enlarge Issues, the Carters withdrew their request for designation against Dolgoff of a site availability issue. They also withdrew

their Opposition to Dolgoff's July 12, 1993 Motion For Partial Summary Decision with respect to the designated air hazard issue and withdrew their July 26, 1993 Countermotion For Summary Decision against Dolgoff on the designated air hazard issue. The Carters stated in their Consolidated Reply that it was only after receiving Dolgoff's August 10, 1993 Opposition To Contingent Motion To Enlarge Issues that the Carters

"... undertook to check the location on the ground of roads previously assumed to correspond to those depicted on the maps. It was then discovered that the actual roads in the Mack Bayou area do not correspond in location to roads depicted on maps, and for this reason the Carters have lost confidence in their position heretofore taken."

Consolidated Reply at 2.

Dolgoff is gratified that the Carters have now acknowledged that there is no proper factual basis for designation of a site availability issue against Dolgoff. Nonetheless, for the reasons set forth in Dolgoff's August 10, 1993 Opposition To Contingent Motion To Enlarge Issues, the withdrawal of the request for a site availability issue underscores the fact that the unverified "To Whom It May Concern" letter of July 22, 1993 from Mr. William S. Fountain provided absolutely no factual basis for designation of a site availability issue against Dolgoff or for the Carters' attempt to have such an issue designated. The Carters' request for specification against Dolgoff of a site availability issue and a site misrepresentation issue rested on that letter. As shown in Dolgoff's Opposition To Contingent Motion To Enlarge Issues, Mr. Fountain, who is an appraiser of property, conducted a mere visual comparison of copies of two different-scale maps and of a page from a plat book -- documents that appear most difficult to reconcile visually with one another. From his visual inspection, Mr. Fountain concluded that "it would appear" to him that "the position of the target" (presumably the Dolgoff site coordinates) is north of Lot 48, which is owned by Mr. J. R. King. This imprecise visual comparison of difficult-to-read and difficult-to-reconcile maps and a plat book page hardly begins to form the basis for designation against Dolgoff of the site availability and site misrepresentation issues sought by the Carters. Mr. Fountain's "To Whom It May Concern" letter is